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No. 83-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, SPEAKER
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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APPELLANTS' REPLY MEMORANDUM

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APPELLANTS' REPLY MEMORANDUM

Appellants submit this reply memorandum because the Motion to Dismiss or Affirm submitted by the State Appellees, we believe, gives a misleading impression of the record. Motion of Appellees Thomas H. Kean, et al., To Dismiss or Affirm, pp. 15-20 [hereinafter "Motion"].

The expert upon whom the State Appellees rely is Republican Assemblyman Richard A. Zimmer. Assemblyman Zimmer is a practicing lawyer who has been a member of the New Jersey Assembly since January 1981, shortly before P.L. 1982, c.1 was enacted. He has an undergraduate degree in political science but no advanced degrees other than his law degree, Zimmer Tr. 6-7. He testified that he had written election analyses for publication by the Ripon Society, a "republican researching policy organization," but had done no other writing for publication. Zimmer Tr. 14-13. He has never

read symposia on reapportionment published by the American Bar Association and the National Science Foundation. He does not know what political scientists are active in the apportionment field. Zimmer Tr. 25-26.

Assemblyman Zimmer testified, in substance, to his belief that the sponsors of P.L. 1982, c.1, had devised and enacted the statute for political reasons. It is this testimony on which the State Appellees rely, *e.g.*, Motion, pp. 16 (Fifth District was "artfully crafted"), 17 ("proponents of the Feldman Plan were not satisfied with the result").

First. Taking Assemblyman Zimmer's disposition testimony for everything it can possibly be worth, it still does not speak to the critical question that must be faced if gerrymandering is cognizable at all. Five Members of this Court have stated that, in order to make out such a claim, there must be a showing that the challenged statute has "diluted" the voting strength of "an identifiable political group," *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653, 2672 (1983) (Stevens, J., concurring), or that it has "invidiously discriminated against a racial or political group," *id.*, at 2687 (White, J., joined by Burger, C.J., Powell and Rehnquist, JJ., dissenting), or that it has the "effect of substantially disenfranchising identifiable groups of voters." *Id.*, at 2689 (Powell, J., dissenting). Assemblyman Zimmer's testimony—that he thought his political opponents were politically motivated in passing their bill—ignores this issue. Indeed, on questioning Assemblyman Zimmer repeatedly stated that he had not even done statistical comparisons for districts which he believed were gerrymandered.* The only record evidence on the district-by-district political

* For example, Assemblyman Zimmer testified that a district was "competitive" if the party split was closer than 55-45. However, he had never looked to see whether the 7th District, which he viewed as gerrymandered, fit within his definition of a competitive district.

effects of P.L. 1982, c.1, and appellants' proposed plan—Dr. Thomas Mann's study of the various proposals in light of ten recent elections—belies any gerrymandering claims. See our Jurisdictional Statement, pp. 18-19.

Second. It is doubtful that the District Court (which had prohibited inquiry into the Governor's motives in vetoing the Brown-Lynch bill, see Transcript 3) relied on Assemblyman Zimmer's testimony about what he thought of his political opponents' motives. Certainly the District Court never mentioned that testimony in its opinion. But in any event, this Court should not hold that a redistricting statute is an unconstitutional gerrymander, and may therefore be ignored by a District Court seeking to redistrict a State, whenever an opposing legislator (whether or not accepted as an "expert" by the District Court) can be found to swear that he believes his opponents motives were bad.

CONCLUSION

Appellants do not believe that the question of gerrymandering need be or should be addressed on the present record. The District Court made no such finding. It believed, erroneously, that the issue was foreclosed by this Court's previous decision in the case. It therefore erred in disregarding the State policies embodied in P.L. 1982,

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Zimmer Tr. 76-77. He agreed that looking at the results of gubernatorial and presidential elections "would be part of a comprehensive analysis," but he had never done that. Tr. 91, 86.

Assemblyman Zimmer's definition of a gerrymandered district is difficult to comprehend. He apparently believes that Democrats are given a partisan advantage if *either* (a) a district becomes more strongly Democratic, or (b) a district becomes more strongly Republican. The first change "bolsters" Democratic strength. The second change "dumps" Republicans. See Zimmer Tr. 92. Under Assemblyman Zimmer's test, it would appear that the only way to avoid a charge of gerrymandering is to forever fix the political composition of every district in the State.

c.1, and substituting its own views on redistricting policy for the State's.

For the reasons set forth in our Jurisdictional Statement, the judgment should be reversed.

Respectfully submitted,

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